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No. 09-10

Supreme Court, U.S.
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In The
Supreme Court of the United States

TIMOTHY JUSTIN JOYNER,

Petitioner,

v.

STATE OF ARKANSAS,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Arkansas

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

I.

Whether the right to present a defense, particularly the right of compulsory process, is violated by a State's imposition of a prohibition on calling the alleged victim as a witness in an *in camera* rape-shield hearing.

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OPINION BELOW

The State of Arkansas, Respondent, opposes the petition of Timothy Justin Joyner, Petitioner, requesting a writ of certiorari to review the judgment of the Arkansas Supreme Court affirming his convictions for four counts of rape and one count of first-degree terroristic threatening. That court's opinion, delivered on April 2, 2009, is published as *Joyner v. State*, 2009 Ark. 168, ___ S.W.3d ___, 2009 WL 887752 (Ark. 2009). *See* Petitioner's App. at 1a-22a.

JURISDICTION

The Court has discretionary jurisdiction to review this case pursuant to 28 U.S.C. § 1257(a). However, because this case does not present the question petitioner wants answered and the decision of the Arkansas Supreme Court does not conflict with relevant rulings of this Court, jurisdiction does not lie to review the question presented in this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Sixth Amendment

United States Constitution, Fourteenth Amendment

United States Supreme Court Rule 10(c)

Arkansas Code Annotated § 16-42-101

STATEMENT OF THE CASE

For purposes of its brief in opposition, Respondent relies on Petitioner's statement of the case and the opinion of the Arkansas Supreme Court in his case, with the following notable additions and exceptions to his statement.

Petitioner was convicted of one count of first-degree terroristic threatening and four counts of rape of a person less than 14 years of age. The first rape occurred between Thanksgiving and Christmas of 2005 and the remaining crimes were committed in March 2006. Petitioner was 28 at the time of the offenses for which he was convicted. The victim, S.O., was 10 at the time of the first rape and 11 at the time the remaining crimes were committed.

The evidence of an alleged 2001 sexual assault on the victim offered by petitioner's counsel at a pretrial rape-shield hearing included the testimony of Tammy Mosley, who testified that she "agreed" with the hearsay statement that it was reported to the "Human Services people" that the victim's mother walked in on Chuck McGhee having sex with the victim in 2001. Petitioner also offered two affidavits, the first of Ms. Mosley stating that she has "first-hand knowledge of

the molestation of [the victim] by Mr. McGhee in 2001" and that the victim "was not a virgin when she accused [petitioner] of rape in 2006," and the second of Destiny Dickson, in which she states simply that the victim "was not a virgin when she accused [petitioner] of rape." Hearsay objections to the testimony of Ms. Mosley and the affidavits were sustained by the trial judge, but the evidence was received into the record as a proffer. The only other evidence offered by petitioner's counsel regarding the alleged 2001 assault is an unauthenticated document entitled "CIP Intake/Risk Assessment/Data Entry" and containing hand-written notes, presumably of an intake worker, to the effect that the reporting party was told by the victim's mother that she walked in on Chuck McGhee having sex with her daughter. Petitioner presented no competent evidence that the alleged 2001 assault occurred.

With respect to the trial testimony of Dr. Jerry Jones regarding an injury he observed to the victim's hymen during an examination following the rapes for which petitioner was convicted, it included his statement that the sexual assault of the victim in 2000 by digital penetration – evidence of which was presented to the jury in the form of a stipulation – could have caused the injury. Dr. Jones also testified that it was impossible to determine from the injury at issue whether it was caused by a finger or a penis or even to determine when or how many times the victim had been penetrated in the past. When asked by petitioner's counsel whether he would expect to see

"different" damage to the victim's hymen if she had been penetrated by a penis rather than an adult's finger, Dr. Jones responded that he could not conclude that the damage would differ and that the damage observed in the victim could have occurred from either type of assault.

Respondent disputes petitioner's contention that his inability to question the victim at the rape-shield hearing "caused irreparable prejudice to Joyner's defense." Because, however, the disputed statement is, in fact, an argument, respondent will respond to it as such below rather than in the statement of the case.

Finally, respondent disagrees with petitioner's contention that the Arkansas Supreme Court's ruling that "[t]here is no requirement that the victim present herself for questioning by the accused" amounts to the establishment of a judicially created categorical prohibition on defendants ever calling the victim(s) at a rape-shield hearing.

REASONS FOR DENYING THE WRIT

A. This Case Does Not Present The Question Petitioner Wants Answered and The Decision of the Arkansas Supreme Court Does Not Conflict With Relevant Rulings of This Court.

Petitioner claims that this case presents the federal constitutional question of whether the right to

present a defense, "in particular the compulsory process component," is violated by "a state's categorical case law prohibition on calling the accuser as a witness in an in camera 'rape shield' hearing." *See* Petition at 15. Indeed, throughout his petition, petitioner repeatedly characterizes the Arkansas Supreme Court ruling at issue as establishing such a "categorical prohibition." *See* Petition at 11, 15, 16, 17. He states, for example, that:

> this case presents this Court with an opportunity to explore issues regarding the right to present a defense, particularly whether *a judicially created categorical prohibition on a defendant calling the alleged victim to testify in an in camera rape shield hearing* violates that right, in particular the compulsory process component.

Petition at 16 (emphasis added). It is this "categorical prohibition" that petitioner contends "conflicts with relevant decisions of this Court" and provides the basis upon which this Court should grant review. *See* Petition at 17.

The Arkansas Supreme Court ruling, however, establishes no such "categorical prohibition." Rather, in finding that the trial court did not err by denying petitioner's request to call the victim at a rape-shield hearing, the majority ruled that "[t]he in camera hearing is not designed to be used as a subterfuge to obtain a discovery deposition from the alleged victim" and that, correspondingly, "[t]here is no requirement that the victim present herself for questioning by the

accused." *See* Petitioner's Appendix at 9a. That statement cannot accurately be characterized as holding that an accused never has a right to question the victim at a rape-shield hearing, although petitioner characterizes it as such in his petition, but rather a reasonable conclusion that a defendant does not have an absolute right under all circumstances to do so.

In an effort to defend, it seems, his characterization of the state court's ruling as establishing an outright prohibition on defendants ever calling the victim at a rape-shield hearing, petitioner states:

> That the Arkansas Supreme Court indeed set up such a prohibition is evinced by the fact that two justices, including the Chief Justice, wrote separately to disagree with the majority's holding but finding harmless error in the refusal to permit Joyner to call the alleged victim.

Petition at 17. It is unclear, and petitioner does not explain, how the fact that two justices disagreed with the majority's reasoning but concurred in the result demonstrates that the majority holding created a "categorical prohibition on a defendant calling the alleged victim" in a rape-shield hearing. The concurring justices never explicitly stated that such was their understanding of the majority opinion; nor does their ultimate conclusion that, "[u]nder the facts of this case, the circuit court erred in concluding that S.O. need not testify at the in-camera hearing" but that the error was nonetheless harmless, "evince" that the majority so held.

Against this backdrop, it is clear that the petition should be denied for want of the categorical constitutional holding the petitioner asks be addressed. Petitioner urges this Court to decide this case in order to determine "whether a judicially created categorical prohibition on a defendant calling the alleged victim to testify in an *in camera* rape shield hearing violates that right, in particular the compulsory process component." *See* Petition at 16. The petition thus hinges on the assertion that the Arkansas Supreme Court established such a "judicially created categorical prohibition." As the respondent explained, however, that assertion is mistaken and, accordingly, this case does not present the issue petitioner asks this Court to decide.

Moreover, petitioner contends that this case is appropriate for review because "[t]he decision of the Arkansas Supreme Court in this case . . . conflicts with relevant decisions of this Court." *See* Petition at 17. None of the cases he cites in support of his contention, however, involved circumstances like those present here or, more importantly, conflicts with the decision of the Arkansas Supreme Court. In *Washington v. Texas*, 388 U.S. 14 (1967), this Court considered whether a state procedural rule prohibiting all defendants from calling as witnesses at trial persons charged as principals, accomplices, or accessories to the same crime violated the defendant's constitutional right to compulsory process. Critical to the holding was the fact that it was "undisputed that the witness' testimony would have been relevant and material and

that it was vital to the defense." *Id.* at 15. This case, in contrast, does not involve a rule preventing whole categories of defense witnesses from testifying at trial, nor, as discussed in detail below, does it involve the exclusion of evidence "vital to the defense" petitioner presented at trial.

The distinctions with *Chambers v. Mississippi*, 410 U.S. 284 (1973), are even more significant. There, the trial court refused to allow the defendant to introduce at trial the testimony of three witnesses that another witness, who did testify at trial, named himself as the murderer on three separate occasions shortly after the murder. *Id.* at 292. Citing a state rule that a party may not impeach his own witness, the trial court also denied the defendant's request to cross-examine that witness at trial for purposes of testing his credibility. *Id.* at 291-92. This Court's conclusion that, "under the facts and circumstances of this case," the defendant was denied due process was based on both the exclusion of the witnesses, which the Court concluded were "critical to Chambers' defense," and the trial court's refusal to permit the defendant to cross-examine a critical witness at trial, thereby withholding from the jury information by which the jury might judge for itself whether that witness could be believed. *Id.* at 294. This Court noted that it did not need to decide – and indeed did not decide – whether either error alone would have occasioned reversal. *Id.* at 296. The facts and circumstances of *Chambers* – as well as the issue

decided by this Court – are, in short, hardly akin to those in the case at hand.

Davis v. Alaska 415 U.S. 308 (1974), also cited by petitioner, is likewise distinguishable. *Davis* dealt solely with the denial of the right to cross-examine witnesses against an accused at trial. *Id.* at 315. There, the defendant, who was charged with burglary, was precluded from making any inquiry into the fact that a "crucial witness for the prosecution" was on probation for burglary under a juvenile court adjudication at the time he identified the defendant to the police and at trial as being involved in the crime. *Id.* at 310-14. Noting that "[t]he accuracy and truthfulness of [the witness'] testimony were key elements in the State's case against" the defendant and that the trial court's ruling precluded him from making a record from which he could argue to the jury his defense that the State's key witness was unreliable, this Court held he was denied the right of effective cross-examination. *Id.* at 317-18.

Nor does the Arkansas Supreme Court's ruling conflict with *Crane v. Kentucky*, 476 U.S. 683 (1986), which involved the denial of the defendant's request to introduce at trial any testimony about the environment in which the police secured his confession. In finding constitutional error in the denial, this Court observed that the defendant's "entire defense was that there was no physical evidence to link him to the crime and that, for a variety of reasons, his earlier admission of guilt was not to be believed" and that, accordingly, the effect of the ruling was the "wholesale

exclusion of [a] body of potentially exculpatory evidence." *Id.* at 691. Thus, like the other cases cited by petitioner and, more importantly, unlike the instant case, it involved the exclusion of evidence at trial that was determined by this Court to be "indispensable to any chance of [the defense raised by Crane] succeeding." *Id.* at 691. *See also Rock v. Arkansas*, 483 U.S. 44 (1987) (cited by petitioner and holding that a trial court must consider the circumstances of a criminal defendant's post-hypnosis testimony before excluding the defendant from testifying at trial on his own behalf).

Petitioner points to no cases from this Court – nor is respondent aware of any – that are materially indistinguishable from the situation here in which the Court held contrary to the trial court. Thus, the Arkansas Supreme Court's ruling does not "conflict[ ] with relevant decisions of this Court," as petitioner contends. *See* Petition at 16. His request that this Court review the Arkansas Supreme Court's Sixth Amendment decision in this case should be denied.

B. The petition raises no meritorious constitutional claim.

Petitioner alleges that he was deprived of his Sixth Amendment[1] right to compulsory process for

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[1] The Sixth Amendment provides, in part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor. . . ." This

(Continued on following page)

obtaining witnesses in his favor when the trial court denied his request to call the victim, Sabrina Oden, at a pretrial rape-shield hearing on petitioner's motion to admit evidence of prior sexual conduct of the victim.[2] Criminal defendants have a constitutional right, implicit in the Sixth Amendment, to present a defense, which includes the right "to offer the testimony of witnesses, and to compel their attendance, if necessary, . . . and to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." *Washington v. Texas*, 388 U.S. 14, 19 (1967). While the right of compulsory process has been characterized as "fundamental," *Chambers*, 410 U.S. at 302, however, even at trial it is not absolute and may yield to countervailing policy considerations of the State. *E.g.*, *Taylor v. Illinois*, 484 U.S. 400, 414-16 (1988). Nor does a defendant's right to compulsory process eliminate a trial court's "'wide latitude' to exclude from trial evidence that is 'repetitive . . . , only marginally relevant,' or poses an undue risk of 'harassment, prejudice [or] confusion of the issues.'" *Crane*, 476 U.S. at 689-90 (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986)). Consistent with these principles, "more than a mere absence of testimony is necessary to establish

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right is applicable in state as well as federal prosecutions. *E.g.*, *Washington v. Texas*, 388 U.S. 14, 17-19 (1967).

[2] It is unclear from the transcript of the hearing whether Ms. Oden was present at the hearing, nor does the transcript of the hearing demonstrate that she was subpoenaed to appear by petitioner's trial counsel.

a violation of the right" to compulsory process as guaranteed by the Sixth Amendment. *See United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982). Instead, it must be shown that the excluded evidence was "relevant and material and . . . vital to the defendant[]" to the extent that its exclusion could have "affected the outcome of the trial." *Id.* at 867-68.

Here, even assuming the victim would have testified at the rape-shield hearing that she was sexually assaulted in 2001,[3] petitioner cannot demonstrate that such evidence was vital to his defense or that its exclusion could have affected the outcome of his trial. As petitioner made clear to the trial court below, he sought to introduce evidence of the alleged 2001 assault for the purpose of demonstrating an alternative source for an injury to the victim's hymen – evidence of which was presented by the State at trial through the testimony of Dr. Jerry Jones. He now claims, as he did on appeal, that his inability to inquire of the victim whether the 2001 assault occurred "deprive[d] him of the ability to fully demonstrate an alternative source for her physical injuries." *See* Petition at 18. His claim, however, cannot be squared with the record. While the trial court

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[3] As discussed, at the rape-shield hearing, petitioner's counsel presented only multiple-hearsay statements that such an assault occurred. In addition, the prosecutor represented to the trial court on two occasions that, while the victim recalled being digitally penetrated when she was five years old in 2000, she had no recollection of being raped in 2001.

denied petitioner's request to call the victim at the pretrial hearing and, ultimately, precluded petitioner from inquiring at trial about the alleged 2001 assault, petitioner nonetheless was permitted to demonstrate to the jury, by means of a stipulation, that the victim suffered a sexual assault by digital penetration in 2000. More importantly, petitioner also established through Dr. Jones what he sought to establish all along – namely, that a prior assault could have caused the injury to the victim's hymen.[4] Accordingly, as the Arkansas Supreme Court observed in ruling on this case, "the jury knew the injury could have predated the conduct alleged against [petitioner]." *See* Petitioner's App. at 16a.

Moreover, Dr. Jones' testimony makes clear that the introduction of evidence that the victim may have suffered penile penetration in 2001 would not have changed his conclusions or the likelihood that the injury at issue was caused by a prior sexual assault rather than by the rapes for which petitioner was on trial. Indeed, he testified that it was impossible to determine from the injury whether it was caused by a finger or a penis or even to determine when or how many times the victim had been penetrated in the past. All that could be concluded from the injury, he testified, was that "at some point in the girl's life, she was penetrated by some object, and it did some

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[4] Dr. Jones testified specifically that "[i]t is possible for this [injury] to be an occurrence from a finger even as far back as 2000."

damage to the hymen." Although petitioner, by contending that penile penetration constitutes "more serious trauma" than digital penetration,[5] attempts to assign additional significance to evidence of the alleged 2001 incident than Dr. Jones' testimony shows is warranted, he points to no authority in support of his contention, and, indeed, the testimony of Dr. Jones demonstrates that his claim is without merit. Specifically, when asked by petitioner's counsel whether he would expect to see "different" damage to the victim's hymen if penetrated by a penis rather than an adult's finger, Dr. Jones responded that he could not conclude that the damage would differ and reiterated that the damage observed in the victim could have resulted from either type of assault.

Under these circumstances, petitioner was not deprived of his right to present a defense. He presented evidence that the victim's injury could have resulted from a prior sexual assault rather than the charged assaults and argued as much to the jury. He simply cannot demonstrate that the inability to call the victim at the rape-shield hearing – even assuming she would have testified that the 2001 assault occurred – deprived him of evidence "vital" to this defense and material to such a degree that it would

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[5] This contention is not made in connection with petitioner's argument that his constitutional right to compulsory process was violated in this case. Instead, it is made in connection with his brief argument on the issue of whether any constitutional violation was harmless beyond a reasonable doubt.

have affected the outcome of the trial.[6] Accordingly, he suffered no violation of his Sixth Amendment right to compulsory process. *See Valenzuela-Bernal*, 458 U.S. at 867-68.

Finally, even assuming a constitutional error occurred, whether it involved the right to compulsory process or to confront witnesses against him, it was harmless beyond a reasonable doubt. This Court has long applied a harmless error analysis to most constitutional errors. *See, e.g., Chapman v. California*, 386 U.S. 18, 23, n. 8 (1967); *Delaware v. Van Arsdall*, 475 U.S. at 681 (Court has "repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt[.]"). Indeed, only a limited class of "fundamental constitutional errors," such as the denial of the right to trial counsel or to an impartial trial judge, defies harmless-error review. *See Chapman*, 386 U.S. at 23, n. 8. The denial of the opportunity to call a

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[6] Indeed, as petitioner does not and cannot deny, had the victim been called as a witness and denied the 2001 assault, the trial court properly could have excluded any reference to the assault at trial under Arkansas' rape-shield statute, Ark. Code Ann. § 16-42-101. *See* Ark. Code Ann. § 16-42-101(c). More importantly, even if the victim had acknowledged being sexually assaulted in 2001, the trial court still properly could have excluded under the rape-shield statute any or all evidence of the assault at trial if it determined, for instance, that such evidence was cumulative and, thus, its probative value outweighed its prejudicial nature. *See* Ark. Code Ann. § 16-42-101(c)(2)(C).

witness does not fall within that limited class, and, accordingly, any error on the part of the trial court is subject to a *Chapman* harmless-error analysis. *See Crane*, 476 U.S. at 691 (erroneous ruling by trial court precluding defendant from calling witnesses to testify about the environment in which the police secured his confession, thereby denying him his constitutional right to present defense that his confession was not to be believed, subject to harmless error analysis).[7] Under such analysis, petitioner is not entitled to relief if it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. *See Neder v. United States*, 527 U.S. 1, 18 (2004). Such a showing is readily made in this case.

First, as respondent previously noted, it is far from clear, and indeed doubtful, that, had petitioner been permitted to call the victim in the pretrial hearing, she would have testified that the alleged 2001 sexual assault even occurred. Even so, as discussed, petitioner was permitted to demonstrate to the jury that the victim had been sexually assaulted prior to the time of the charged conduct and that the prior assault could account for the injury to her hymen. Petitioner, in other words, presented other evidence relevant to his claim that he did not cause the injury to the victim. Indeed, as discussed above,

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[7] The denial of the opportunity to cross-examine an adverse witness is also subject to harmless-error analysis. *See, e.g., Van Arsdall*, 475 U.S. at 682.

Dr. Jerry Jones' testimony makes clear that evidence of any additional prior sexual assaults – including one involving penile penetration – would not increase the likelihood that the injury predated the charged conduct. Consistent with the doctor's testimony, petitioner's trial counsel stated to the jury in closing that it was stipulated and "uncontroverted that in 2000 this little girl was, I mean, basically raped."

Moreover, the overall strength of the prosecution's case is a factor to be considered in determining whether an error is harmless. *E.g.*, *Van Arsdall*, 475 U.S. at 684; *see also Harrington v. California*, 395 U.S. 250, 254 (1969) (denial of opportunity to cross-examine adverse witness harmless beyond reasonable doubt where wrongfully admitted evidence was cumulative and untainted proof of defendant's guilt was overwhelming). Here, the jury heard from the victim, who testified in no uncertain terms that petitioner raped her on four separate occasions, as well as a DNA expert, who testified that underwear found in the victim's bedroom closet contained a mixture of DNA consistent with that of victim and petitioner. This evidence, along with petitioner's ability to demonstrate and argue to the jury the possibility that the victim's injury predated the charged conduct, makes it clear beyond a reasonable doubt that a rational jury would have found petitioner guilty despite any error.

Finally, petitioner's argument that any constitutional error was not harmless beyond a reasonable

doubt – an argument which is limited to his one-sentence contention that penile penetration involves "more serious trauma" than digital penetration – is, as mentioned above, unsupported by any evidence in the record and contradicts the undisputed trial testimony of Dr. Jones that either type of penetration could have caused the injury to the victim and that penile penetration does not necessarily result in greater or different injury to a child victim than digital penetration.

As this Court observed in *Neder*, 527 U.S. at 19 (citations omitted):

> holding [a constitutional] error harmless does not "reflec[t] a denigration of the constitutional rights involved." . . . On the contrary, it "serve[s] a very useful purpose insofar as [it] block[s] setting aside convictions for defects that have little, if any, likelihood of having changed the result of the trial."

On the facts of this case, there is little, if any, likelihood that permitting petitioner to call the victim at the rape-shield hearing would have changed the result of the trial. Indeed, the ultimate evidence of petitioner's guilt lay in the damning testimony of the victim. Absent evidence of the alleged 2001 assault, the jury was still aware of the possibility that the victim's injury was caused by a sexual assault predating the rapes with which petitioner was charged, and there is simply nothing in the record to suggest that its conclusion would have been different. Accordingly, as the concurring justices of the Arkansas

Supreme Court found, even assuming the occurrence of a constitutional error, such error was harmless beyond a reasonable doubt.

CONCLUSION

The petition for a writ of certiorari to the Arkansas Supreme Court should be denied.

Respectfully submitted,

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